No. 16,062

United States Court of Appeals

For the Ninth Circuit

JAMES N. GREEAR,
Appellant,

vs.

MARY SCHAAF GREEAR,
Appellee.

Appeal from the United States District Court for the District of Nevada.

REPLY BRIEF OF APPELLANT.

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TEXT

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I. STATEMENT OF ADDITIONAL FACTS.

The record does not indicate that the appellant raised the question of the application of the agreement on community property in the Virginia proceedings. It does not even appear that the appellant raised the question involved with reference to usual, ordinary and reasonable office expenses in the Virginia suit.

II. ARGUMENT.

Since appellant and appellee disagree as to the manner of stating the question involved, appellant will discuss the section of appellee's brief designated as

"Questions Involved" in the argument portion of appellant's reply brief.

Appellant still insists that the trial Court erred in its conclusion that the community property law did not "enter the picture" at this stage of the case. The true question involved is what property can the agreement apply to and appellant contends that it cannot apply to property which belongs to a third person who was not a party to the agreement or to any of the actions involving the agreement. If the parties had intended the agreement to be measured by the personal earnings of appellant as a practicing physician then they could have said so. Had they done this then even in the case of a business partnership, a different measuring device would have been used than is now proper. Not having so agreed, appellee cannot now use the income of a third person in determining what monies should be paid her by appellant. Furthermore, if appellant were receiving income from a new partnership, marital or otherwise, and appellant should become ill so that his personal income was nothing, you can rest assured that appellee would resist any attempts of appellant to try and avoid the application of the agreement to appellant's share of the partnership income simply because he had nothing to do with earning it.

Although both appellee and the trial Court did state that it was clear as to what the parties intended, here again appellant is before the instant Court because he does not agree with that statement. The agreement is not ambiguous and, therefore, must be in-

terpreted by what it says and the words used therein are binding equally on both parties. It is simply a problem for the Court to interpret what the words used mean under these circumstances.

Appellant will not rehash the argument with reference to the various authorities cited at this time, but will devote the rest of the brief to the claim of appellee that apparently the judgment of the Virginia Court should be *res judicata* as to all questions raised in this proceeding.

In answer to this claim it is appellant's position, first, that *res judicata* is an affirmative defense which should have been pleaded and was not pleaded, and therefore cannot be raised at this time. Rule 8(c) Title 28 USCA.

Secondly, appellant contends that there is nothing on the record to properly bring the question of *res judicata* before this Court. It is true the trial Court, as set forth in appellee's brief, used the term *res judicata* on numerous occasions but nowhere was it stated that the issue with reference to community property was raised and with reference to the expenses the trial Court stated:

> "Indeed, it does not appear that defendant contested the application of such 'yardstick' in the Virginia suit, but if he did it was disregarded by the Court." (Tr. 36-37.)

It is submitted that the trial Court in using the words "res judicata" did so without having the issue presented to it since it was not pleaded nor argued,

and in fact in paragraph II of his answer the appellant admitted the Virginia judgment. (Tr. 21-22.) Also he admitted the entry of the Virginia judgment at the pre-trial conference. (Tr. 25.) It must have been with these admissions in mind that the trial Court was using the expression "res judicata" to indicate simply that there was to be no argument about how much was due from appellant to appellee under the Virginia judgment. For appellee to now claim that the judgment of the Virginia Court is *res judicata* when the question was never presented in the pleadings nor to the trial Court in argument for that matter is grossly unfair to appellant.

Thirdly, the doctrine of *res judicata* could not apply to the instant situation because the facts sued upon by appellee in her second cause of action are different from the facts sued upon in Virginia.

If appellant was so unfortunate as to have failed to assert a right in the Virginia proceeding and thereby the judgment against him was larger than it should have been, it certainly would not be proper to perpetuate the injustice done to him by now stating he cannot now assert all of the defenses which he may have to the instant litigation. If appellant were in any way attacking the Virginia judgment then the question of *res judicata* would be properly before the Court, but since no such attack is made and since there is no affirmative pleading asserting the defense of *res judicata* as to the issue of community property and as to the issue of what are usual, ordinary and

reasonable office expenses, such question is not before this Court nor was it before the District Court.

III. CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court for the District of Nevada should be reversed by modifying the same in the following respects:

1. The trial Court should only include appellant's share of community property in computing monies payable to appellee under their agreement.

2. In computing the amount due from appellant to appellee under said agreement, appellant should be allowed to deduct the expenses set forth in appellant's opening brief from his share of the community income.

Dated, Reno, Nevada,
March 20, 1929.

Respectfully submitted,
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ALEX. A. GARROWAY,
By JOHN C. BARTLETT,
Attorneys for Appellant.